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Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing-Are They Constitutional?

Rosalind K. Kelley

Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing — Are They Constitutional?

> In 1656 a woman was sentenced to be 'whipt at Tauton and Plymouth on market day.' She was also to be fined and forever in the future 'to have a Roman B cutt out of ridd cloth and sewed to her vper garment on her right arm in sight.' This was for blasphemous words. In 1638 John Davis of Boston was ordered to wear a red V 'on his vpermost garment' — which signified, I fancy, viciousness. In 1636 William Bacon was sentenced to stand an hour in the pillory wearing 'in publique view' a great D — for his habitual drunkenness . . . [In 1633] in Boston: 'Robert Coles was fyned ten shillings and enjòyed to stand with a white sheet of paper on his back whereon Drunkard shalbe written in great Ires and to stand therewith soe longe as the Court finde meete, for abusing himself shamfully with drink.'[1]

I. Introduction

In October, 1975, Windell McDowell was convicted of purse snatching and was placed on probation with the condition that he was not to go out of his house unless he was wearing metal taps on the soles of his shoes.[2] In 1978, a man found to have illegally grown marijuana was ordered to wheel his plant twenty times around the courthouse in a wheel-barrow for four consecutive Sundays and to carry a notice proclaiming his belief in the propriety of legalizing the use of marijuana.[3] In May 1985, Ronald Barbone was convicted of

1. A. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS 88 (1896). The wearing of labels or letters symbolizing the crime committed is not an American or Puritanical invention. Dating back to 1364, England enforced such punishments to reprimand rebels, liars and criminals. Despite the inability of some to read the labels placed upon those sentenced, the message was quite clear. *Id.* at 94-95. Other sentences, such as the pillory, stocks, gallows or penance stool, were often coupled with the scarlet letter. *Id.* at 90.

2. People v. McDowell, 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976). The condition was intended to preclude the defendant from approaching purse snatching victims silently, the means he used to facilitate his trade. *Id.* at 812, 130 Cal. Rptr. at 843. The defendant argued that, by imposing this condition, the sentencing court stigmatized him by implying, "You are a purse snatcher and others must always know of your presence." *Id.* at 812, 130 Cal. Rptr. at 842-43. The defendant further contended that such a sentence was analogous to placing a sign "around [his] neck that read, 'I am a thief.' " *Id.* The appellate court reversed and remanded the sentencing court's order for clarification as to whether the taps were to be worn only when leaving the house of at all times outside of his home. *Id.*

3. Sunday Times, April 14, 1978, *cited in* N. WALKER, PUNISHMENT, DANGER &

driving while under the influence of alcohol. The sentencing court required Barbone to affix to his vehicle special license plates, which were of a different color than ordinary plates.[4] In June 1985, Arthur Goldschmitt was convicted of driving while under the influence of alcohol and, in exchange for specified driving privileges, was sentenced to place upon his vehicle a bumper sticker that read "CONVICTED DUI — RESTRICTED LICENSE."[5] In May 1987, Richard Bateman, upon his second conviction for child molestation, was required, as a condition of his probation, to place upon the door of his residence and upon both doors of his vehicle a sign that stated in three-inch lettering, "DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED."[6]

This practice of labeling a criminal with symbols or words expositive of the offense committed was used in colonial America as a form of punishment by humiliation.[7] Penologists, however, later deemed the method to be an archaic and unacceptable means of dealing with anti-social behavior, and henceforth courts sent criminals to correctional institutions.[8] Today, faced with the reality of ineffective[9] and overcrowded prisons,[10] the judiciary has been

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STIGMA 144 (1980).

4. State v. Barbone, No. 3653, slip op. (Ohio Ct. App. June 26, 1987). The controlling statutory provision, OHIO REV. CODE ANN. § 4503.231 (Baldwin 1984), provides:

> § 4503.231 Special License Plates for Motor Vehicles Whose Standard Plates Have Been Impounded.
>
> No motor vehicle . . . of a person whose certificate of registration and identification license plates have been impounded as provided by division (B) of section 4507.38 of the Revised Code, shall be operated or driven on any highway in this state unless it displays identification license plates which are a different color from those regularly issued and carry a special serial number that may be readily identified by law enforcement officers. The registrar of motor vehicles shall designate the color and serial number to be used on such license plates, which shall remain the same from year to year and shall not be displayed in any other motor vehicles.

Id.

5. Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (per curiam) *appeal denied*, 496 So. 2d 142 (1986). Defense counsel for Mr. Goldschmitt has expressed his desire to appeal this issue to the Supreme Court of the United States. *60 Minutes: Titus v. Metcalfe* (ABC television broadcast, February 2, 1986).

6. State v. Bateman, No. A44854 (Or. Ct. App. filed Dec. 17, 1987). *See also* State v. Bateman, 48 Or. App. 357, 616 P.2d 1206 (1980) (involving defendant's first molestation conviction).

7. L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 5 (1975). *See also* A. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS 88 (1896).

8. *See* Leiber, *The American Prison: A Tinderbox*, CRIMINAL JUSTICE 84/85 227 (1984).

9. Heijder, *Can We Cope With Alternatives?*, 26 CRIME & DELINQUENCY 1, 1 (1980) ("The correctional institution is supposed to be a people changing agency, yet we doubt whether prison really persuades offenders to abandon criminal behavior.").

10. *Id.* at 2. *See also* Kramer, *Forward*, 9 NEW ENG. J. ON CRIM. AND CIVIL CONFINEMENT 230 (1985).

compelled by the economic needs of society to explore innovative alternatives to incarceration.[11] Thus, focusing upon the goals of punishment[12] and the protection of society,[13] a minority of judges have returned to a form of "scarlet letter" sentencing.

> But the point which drew all eyes, and, as it were, transfigured the wearer, — so that both men and women, who had been familiarly acquainted with Hester Prynne, were now impressed as if they beheld her for the first time, — was that SCARLET LETTER, so fantastically embroidered and illuminated upon her bosom. It had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself.[14]

Modern-day scarlet letters have stunned the country and drawn national attention to the various issues surrounding these controversial sentencing decisions.[15]

This Comment discusses the evolution of punishment and the historical attempts made to move away from incarceration as a primary source of punishment and examines where penology stands today in its search for alternatives. This Comment then analyzes these scarlet letter sentences in terms of the eighth amendment right to be free from cruel and unusual punishment. It explores the effectiveness of such punishments as practical alternatives to incarceration and addresses their potential for protecting society. Finally, this Com-

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> Paradoxically, while we pursue sentencing policies that pack offenders into prisons through the front door, thirty-one states now under court order to reduce prison overcrowding are releasing them out the back door. Old and dilapidated prisons and houses of correction are literally bulging at the seams using single cells to sleep three or more inmates and utilizing cellers, corridors, and bathrooms to line up bunk beds. Rehabilitation and correction is no longer considered a goal nor even a possibility.

Id.

11. *Id. See also* Thompson, *Overcrowding Spurs Alternative Sentences*, 98 L.A. DAILY JOURNAL, Nov. 13, 1985, at 1, col. 3.

12. *See generally* W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 1.5 (1986) [hereinafter LAFAVE & SCOTT (articulating the primary goals of punishment as specific deterrence, general deterrence, rehabilitation, incapacitation, education and retribution). *See also* United States v. Carlson, 562 F. Supp. 181, 183-84 (N.D. Cal. 1983) (listing the primary goals of punishment as specific deterrence, general deterrence, restraint and rehabilitation).

13. *See* Dep't of Health & Social Services v. Neakok, 721 P.2d 1121 (Alaska 1986) (stating that the state is required to consider public safety when administering sentencing conditions). *See also* R. GERBER & P. MCANANY, CONTEMPORARY PUNISHMENT 4 (1972) (explaining that the protection of society is the underlying principle of all criminal sanctions.).

14. N. HAWTHORNE, THE SCARLET LETTER 74 (1850).

15. *See* Silverman, *A Modern-Day Scarlet Letter for a Sex Offender*, NAT'L L.J. August 31, 1987, at 8, col. 1; *Scarlet Bumper: Humiliating Drunk Drivers*, TIME, June 17, 1985, at 52; Nordheimer, *In-House Dispute: Drunken-Driver Bumper Stickers*, N.Y. TIMES, June 6, 1985, at A22, col. 3.

ment supports the imposition of scarlet letter sentences while urging that legislative measures be taken to curtail the potential abuses that could flow from this type of alternative sentencing.

II. Punishment

A. History

Methods of punishment and corrections of criminal offenders have undergone many changes. These changes denote a corresponding development in morality, economic conditions, and theories of criminology and penology.[16] The criminal justice system has evolved immensely from the retaliatory punishments of the early Middle Ages to contemporary methods that focus upon the diagnosis, treatment and rehabilitation of offenders[17] and the education of society.[18] Nonetheless, a severe dissatisfaction with the success of treatment under the theory of rehabilitation has spurred a reacceptance of a theory that embraces retribution as the principal goal of punishment.[19] Criminal law has, therefore, progressed to a point of coming full circle,[20] by accepting retribution and punishment as the primary goals of correctional efforts, themes espoused in the early Victorian ages.[21]

In the Middle Ages, punishments focused upon a *quid pro quo* mode of justice.[22] This system permitted the injured private individual to impose proportional punitive sanctions upon the person who caused the injury.[23] The injured person or family thereby obtained the benefit and satisfaction of inflicting the warranted degree of pain and suffering upon the offender.[24] Eventually, the public body became responsible for exacting punishment,[25] a shift in roles that occurred as a result of cases in which the injured party or family failed to survive to administer "justice."[26] The offender then fell under the

16. *See* Heijder, *supra* note 9, at 1.

17. Lopez, *The Crime of Criminal Sentencing Based on Rehabilitation*, 11 GOLDEN GATE L. REV. 533, 537-39 (1981); J. SENNA & L. SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 376, 393 (1981).

18. Lopez, *supra* note 17, at 539-41.

19. Richardson, *From Retribution to Rehabilitation to Retribution*, 36 J. OF MO. BAR 149 (1980) (noting retribution as the principal goal of the criminal justice system in the last ten years). *See also* Lieber, *supra* note 8, at 227.

20. *See generally* R. GERBER & P. MCANANY, *supra* note 13, at 25-30.

21. Richardson, *supra* note 19, at 149.

22. R. GERBER & P. MCANANY, *supra* note 13, at 26.

23. *Id.*

24. *Id.* at 26-38.

25. *Id.* at 28.

26. *Id.*

King's mercy.[27] This shift effected a change in focus from the need of the injured individual to gain personal satisfaction to the need of society to condemn anti-social behavior.[28]

Despite this evolution from private to public justice, however, retribution remained the primary justification for punishment.[29] Thus, British justice of the era included branding, lashing, ear cropping and expulsion to penal colonies.[30] In addition, hundreds of minor crimes such as petty theft could be punished by death in this era.[31]

The earliest reformers, Quakers,[32] developed a novel approach[33] to punishment in the late 1700s.[34] Believing that solitude would enable offenders to see their errors, repent and reform,[35] they created separate cells for confinement.[36] The Quakers required no work of the prisoners, since they were to occupy their time by studying the Bible.[37] The Quakers released prisoners when society regarded them as being sufficiently reformed.[38] Society viewed this penitentiary system as an effective means of dealing with offenders, and the system later became the predominant method in America as well as Europe during the nineteenth and twentieth centuries.[39] This form of punishment encouraged the theory of rehabilitation,[40] which became the primary goal of punishment in the early 1900s.[41]

By 1935, a majority of states, in response to this goal, adopted indeterminate sentencing structures.[42] Indeterminate sentencing accords the sentencing judge broad discretion[43] in order to individual-

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27. *Id.* at 30.
28. *Id.* at 28-30.
29. *Id.*
30. Lieber, *supra* note 8, at 230.
31. *Id.*
32. A Quaker was a member of the religious Society of Friends. Literally, "Quaker" means to "tremble at the word of the Lord." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1067 (1967).
33. This approach was novel because, up until this time, punishment usually involved the receiving of pain or suffering.
34. Lieber, *supra* note 8, at 230; *see also* Lopez, *supra* note 17, at 538.
35. Lopez, *supra* note 17, at 538.
36. *Id.*
37. *Id.*
38. *Id.*
39. Lieber, *supra* note 8, at 230; *see also* Lopez, *supra* note 17, at 538.
40. Incarceration is thought to stimulate a behavioral change. Heijder, *supra* note 9, at 3.
41. Lopez, *supra* note 17, at 539-41.
42. *Id.*
43. Lopez, *supra* note 17, at 539-41. Judicial discretion is presently under considerable scrutiny, as few persons are satisfied with the degree of discretion provided. There are, however, sharp divisions as to what reforms are desirable. J. ISRAEL, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 11 (1979).

ize treatment.[44] In determining an appropriate sentence, a judge is permitted to evaluate a variety of factors, such as mitigating and aggravating circumstances and past behavior. The judge is also able to consider his own intuition as to the offender's potential for social conformity.[45] Such a structure prevents two defendants who are charged with the same statutory violation but who committed the violations in very different manners from being treated exactly alike.[46] In each case, indeterminate sentencing allows the judge to take all the relevant circumstances into account and to provide an appropriately-tailored sentence.[47]

Under this theory of rehabilitation, therapeutic treatments are provided to those offenders who do not require or would not be benefitted from incarceration.[48] In the mid 1900s, the penal system developed probation and parole systems to prevent any adverse affects of incarceration or long-term incarceration.[49] Both programs were geared toward discovering the underlying psychological motivations behind the criminal behavior and modifying the behavior to conform with societal expectations.[50] Society viewed the programs' high cost as justified if recidivism could in fact be reduced.[51]

During the 1970s, several studies condemned these rehabilitation efforts as having little or no effect on recidivism.[52] Critics urged

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Federal and state statutes provide trial courts with broad discretion when imposing a sentence, and each judge perceives his realm of discretion differently. The judge's own background and experience, as well as morality, may affect sentencing decisions. In total, a judge may consider as many as 205 factors in making sentencing decisions. Fleet, *Sentencing the Criminal — a Judicial Responsibility*, 9 AM. J. TRIAL ADVOC. 369, 371-72 (1986).

"Appellate review of probation conditions generally has been limited to cases of clear abuse of discretion." Note, *Corporate Probation Conditions: Judicial Creativity or Abuse of Discretion?*, 53 FORD. L. REV. 637, 648 (1982). Severe or unusual probation terms have been drawing close scrutiny from the courts to avoid equal protection violations. *See, e.g.*, United States v. Restor, 679 F.2d 338, 340 (3rd Cir. 1982); United States v. Pastor, 537 F.2d 675, 681 (2nd Cir. 1976); United States v. Atlantic Richfield Co., 465 F.2d 58 (7th Cir. 1972). Probation conditions "must be narrowly drawn to achieve rehabilitation and protection of the public without unnecessarily restricting the probationer's otherwise lawful activities." Hidgon v. United States, 627 F.2d 893, 898 (9th Cir. 1980).

44. Fleet, *supra* note 43, at 372. Some critics suggest that the individualization of sentences is crucial to the prevention of crime and the correction of its effects, as well as to the administration of justice.

45. *Id.* at 370-71.

46. J. Israel, *supra* note 43, at 12. For example, a kidnapping in which a divorced parent takes a child from the other parent's custody without permission is vastly different from a kidnapping in which a child is snatched by a stranger for ransom money. *Id.*

47. *Id. See also* Fleet, *supra* note 43, at 372.

48. Lieber, *supra* note 8, at 230.

49. Lopez, *supra* note 17, at 539.

50. Kramer, *supra* note 10, at 320-21.

51. *Id.*

52. A recidivist is "a habitual criminal; a criminal repeater. An incorrigible criminal. One who makes a trade of crime." BLACK'S LAW DICTIONARY 1141 (5th ed. 1979). See also

that the extended prison terms imposed in the name of rehabilitation resulted only in the overcrowding of correctional institutions.[53] Furthermore, they emphasized incarceration's shocking rate of failure as a tool for reform. They suggest that, by their very nature, prisons ensure these failures.[54] "Mass living and bureaucratic management of large numbers of human beings are counter-productive to the goals of positive behavior change and reintegration."[55] Finally, there is the problem of overcrowding. Prisons have evolved into a billion-dollar-a-year institution unable to combat the need for growth.[56] Building new facilities is economically unfeasible for the government and will provide only temporary relief.[57]

Such criticism has inspired legislatures to adopt determinate sentencing structures,[58] which provide for definite prison terms and cause the abandonment of programs designated to further rehabilitation.[59] Under a determinate structure, prisoners are released from facilities after their sentence has been served, regardless of their mental condition.[60] This sentencing structure reflects a return in thinking to the classical theory of retribution as a primary goal of punishment.[61] The prisoner must pay his penance, after which time he is released. The determinate sentencing scheme reduces spending but places an inordinate reliance on the prison systems.[62] Under such a scheme, there is no incentive for the prisoner to seek help.[63]

Lopez, *supra* note 17, at 551-75 (finding inherent weaknesses in the theory that prisoners can be rehabilitated through psychological, vocational, or moral rehabilitation and arguing that the criminal justice system, had it recognized these defects earlier, could have avoided pointless programs carried out in the name of rehabilitation). *But see* Clanon, *Rehabilitation was Working*, 2 CALIFORNIA LAWYER 13 (1982) (arguing that sentencing not geared toward rehabilitation has resulted in a greater recidivism rate in California).

53. *See, e.g.*, Lieber, *supra* note 8, at 230.

54. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 597 (1973).

55. *Id.*

56. Smith, Bubinzer & Holmes, *An Alternative to Traditional Offender Sentencing: The Task Sentence — A Performance Contingent Model*, 9 NEW ENG. J. ON CRIM. CONFINEMENT 343 (1983). The average cost to house a prisoner ranged from $25,000 to $30,000 a year per prisoner in 1982. During that same year, thirty-one states were under court order to reduce prison overcrowding. Ironically then, while judges send criminals to jail through the front door, they also let them out through the back door. Kramer, *supra* note 10, at 320.

57. Kramer, *supra* note 10, at 320. "Construction costs average 72,000 a bed, but with interest on bonds and loans the real cost is about 200,000." *Id.*, *citing* K. SCHOEN & S. GETTINGER, OVER CROWDED TIME — WHY PRISONS ARE SO CROWDED AND WHAT CAN BE DONE 22 (1982).

58. Lopez, *supra* note 17, at 541-43. *See also* CLANON, *supra* note 52, at 13.

59. Lieber, *supra* note 19, at 229.

60. N. WALKER, PUNISHMENT DANGER STIGMA 24 (1980).

61. *Id.*

62. Kramer, *supra* note 10, at 319.

63. *See* Lopez, *supra* note 17, at 544.

> [The prisoner's] knowledge that he may be restrained only for a definite period is in many instances the rock on which our plans split. "The Judge gave me ten years. I can do that standing on my head," a prisoner once said to me. But if the judge had been able to say not less than ten years and as much longer as seems necessary, we should have witnessed a different reaction on his part.[64]

Because of the attitude assumed by prisoners, the threat of incarceration has not been a successful deterrent to crime.[65] Critics therefore believe that the recidivism rate may continue to climb under a sentencing system based upon retribution.[66]

B. Historical Innovations

Historically, reforms have been successful in their attempts to provide creative alternatives to the purely punitive forms of punishment.[67] In the 1840s, Maconochie introduced the mark system,[68] which was first utilized in a British penal colony at Norfolk Island.[69] This program consisted of three various stages of development: the penal, the mark and the social stages.[70] The penal stage entailed separate confinement, meals consisting solely of bread and water, and moral teachings. During the mark stage, the offender was permitted to associate with others and granted more freedom.[71] In the final stage, the offender was permitted to associate freely with the other inmates. A prisoner achieved elevation to the various stages by his voluntary participation in therapy and improvement in social conformity, for which he earned marks.[72] If the offender chose to do nothing to rehabilitate himself, he remained at stage one.[73] To be released, however, he had to surpass stages two and three. Because of Maconochie's belief in social pressure, officials in the colony figured the earned marks of each individual by averaging the daily productivity of the group as a whole. Such a procedure used peer pressure constructively to encourage reform and prevented it from

64. *Id.* (citing J. MITFORD, KIND AND UNUSUAL PUNISHMENT 79 (1973)).
65. Heijder, *supra* note 9, at 1-2. The author believes that prisons have become society's dumping grounds for undesirables.
66. *See* Clanon, *supra* note 52, at 13.
67. Smith, Bubinzer & Holmes, *supra* note 56, at 344.
68. *Id. See generally* A. MACONOCHIE, GENERAL VIEWS REGARDING THE SOCIAL SYSTEM OF CONVICT MANAGEMENT (1939).
69. Smith, Bubinzer & Holmes, *supra* note 56, at 344.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

serving a destructive role in thwarting the desire to participate in therapy.[74]

This system, along with Crofton's "Irish System" and Brockway's ideological contributions, was extinguished by political turmoil.[75] Unfortunately, these methods would provide little to alleviate the present problem facing American corrections. Because they relied heavily upon incarceration, these methods would tend to contribute to prison overcrowding rather than provide an alternative that does not involve incarceration as a primary component of the sentence.

Like the prison system, probation and parole departments also suffer from overburdening, possibly as the result of attempts to alleviate prison overcrowding.[76] For example, overcrowding in local prisons required emergency action in New York City in 1982. In response to a federal order that addressed overcrowded prison conditions, six-hundred-ten prisoners were released on parole.[77] Further, the clientele growth of probation departments has surpassed both prison and parole population rates.[78]

The increased reliance on probation has stirred much debate. Supporters argue that probation and parole can reduce crime by reforming criminals and can cut costs and prison overcrowding by releasing low-risk offenders.[79] Unfortunately, penologists have found that only three percent of those criminals currently being sentenced to prison could be considered low-risk,[80] and releasing only three percent of the prison population is hardly sufficient to solve the overcrowding dilemma.[81] Thus, by necessity, moderate-risk offenders as well as low-risk offenders are being released from correctional institutions.[82]

Critics contend that society cannot continue to release these dangerous criminals and still enjoy its notion of a free and safe society.[83] Therefore, concerned individuals have proposed various alter-

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74. *Id.*
75. *Id.*
76. Petersilia, *Community Supervision: Trends and Critical Issues*, 31 CRIME AND DELINQUENCY 339-40 (1985).
77. Taylor, *Reform Attempts Lead to Increase in Prison Terms*, L.A. DAILY J. Dec. 28, 1983, at 1, col. 6.
78. Petersilia, *supra* note 76, at 339-40.
79. *Id.* at 341.
80. *Id.* at 344.
81. *Id.*
82. *Id.*
83. Kramer, *supra* note 10, at 320.

natives to incarceration.[84] Such innovative methods include: house arrest,[85] intensive supervision probation,[86] earn-it programs,[87] and others.[88] These programs have the potential to be successful because they represent an "intermediate" type of sentence. While not as severe as prison, they are more controlled and supervised than traditional probation or parole.

C. *Contemporary Innovations*

In their search for safe and effective alternatives, sentencing courts have also turned to "scarlet-letter" sentences. For example, in 1985, two common pleas judges in Sarasota County, Florida, devised a program whereby convicted drunken drivers[89] could be punished by orders requiring them to affix, to their vehicles, bumper stickers that read "CONVICTED DUI — RESTRICTED LICENSE."[90] This program, which has gained national attention,[91] enabled a person whose driver's license has been suspended because of driving while under the influence of alcohol to request a restricted license.[92] The license allows the offender to drive for business purposes only, provided he places the sticker on his vehicle, completes a substance abuse course,[93] pays a fine and court costs,[94] and performs commu-

84. *Id.*

85. *See* Hurwitz, *House Arrest: A Critical Analysis of An Intermediate Level Penal Sanction*, 135 U. PA. L. REV. 771 (1987).

86. *See* Petersilia, *supra* note 76, at 339.

87. Kramer, *supra* note 10, at 321.

88. Judges have also opted to provide stringent standards for criminals to follow while on probation. *See* United States v. Bishop, 537 F.2d 1184, 1186 (4th Cir. 1976) (offender forbidden to attend racetrack); Malone v. United States, 502 F.2d 554, 556-57 (9th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975) (offender forbidden to attend Irish organizational meetings); United States v. Kohlberg, 472 F.2d 1189, 1190 (9th Cir. 1973) (offender forbidden to associate with homosexuals); Whaley v. United States, 324 F.2d 356, 359 (9th Cir. 1963) (offender forbidden to engage in repossession business); 7 NAT'L L.J., April 1, 1985, at 43; 7 NAT'L L.J., November 26, 1984, at 47; 7 NAT'L L.J., November 19, 1984, at 47; 6 NAT'L L.J., April 9, 1984, at 43; 6 NAT'L L.J., March 19, 1984, at 51.

89. Drunken drivers are chosen as subjects for the program because of the mounting offenses and societal dissatisfaction with the deterrent effect of criminal sanctions. Telephone interview with William I. Munsey, Jr., Assistant Attorney General, Sarasota County, Florida (Sept. 14, 1988).

90. Brief for Appellant at 1, Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) [hereinafter Brief for Appellant, *Goldschmitt*]. *See also* Note, *The Bumper Sticker: The Innovation that Failed*, 22 NEW ENG. L. REV. 643 (1988).

91. *See generally Scarlet Bumper*, *supra* note 15, at 52; Nordheimer, *supra* note 15, at A22, col. 3.

92. Brief for Appellant, *Goldschmitt*, *supra* note 90, at 1.

93. *Id.* Those convicted of violating Florida drunken driving provisions are required to attend and complete a substantive abuse course specified by the court. FLA. STAT. ANN. § 316.193 (West Supp. 1986).

94. FLA. STAT. ANN. § 316.193(2)(a)(1)(a) (West Supp. 1986) ("Any person who is convicted of a violation of subsection (1) shall be punished by a fine of (a) not less than $250

nity service.[95] The defendant is thus given the choice of applying the bumper sticker to his vehicle and driving with restrictions or of being sentenced under the traditional sentencing guidelines of the offense.[96]

The Salvation Army Department of Corrections,[97] which oversees all misdemeanor probations in Sarasota County, monitors the entire program.[98] Within hours of obtaining a Business Purposes Only sticker, defendants must report to the Salvation Army.[99] A Salvation Army officer then supervises the placement and maintenance of this sticker from that point until the end of the probationary period.[100]

Defendants have objected to the bumper sticker program on two separate grounds: the first amendment right to free speech[101] and the eighth amendment proscription of cruel and unusual punishment.[102] Nonetheless, the trial courts issuing these stickers have adhered to their original position that the stickers are constitutional, as the least restrictive means of protecting the safety, health and welfare of the community.[103]

The Second District Court of Appeals of Florida has affirmed the trial courts' sentencing action.[104] The Florida Supreme Court has declined to accept jurisdiction over these cases and thus allowed the sentencing procedure to stand.[105] Presently, defendants are report-

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or more than $500 for a first conviction.").

95. FLA. STAT. ANN. § 316.193(6)(a) (West Supp. 1986).

96. Transcript of Proceedings, Goldschmitt v. State, No. 85-1649 at 6. Judge Titus explained the terms of probation to the defendant as:

> If you do not wish to drive for business purposes you do not have to have that bumper sticker attached to your car. It will not be made part of your person. It will not be displayed on your face, your body or any other part of you. It will be placed on your car only if you wish to drive for business purposes only.

Id. The County Court has found that the bumper sticker requirement constitutes a special condition of probation permitted under FLA. STAT. ANN. § 948.03(4) (1985).

97. Brief for Appellant, *Goldschmitt, supra* note 91, at 1.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Brief for Appellant, *Goldschmitt, supra* note 91, at 3. Defendant claimed that by forcing him to affix the sign on his car, he was being forced to speak against his will in violation of his first amendment right to free speech. *See also* Wooley v. Maynard, 430 U.S. 705 (1977) (a Jehovah's witness could not be forced to reveal the New Hampshire motto on his license plates "Live free or die"). *But see* Porter v. Templar, 453 F.2d 330, 334 (10th Cir. 1971) (probation condition may limit association with "groups that would palpably encourage [the offender] to repeat his criminal conduct"); People v. Arvanities, 17 Cal. App. 3d 1052, 1062, 95 Cal. Rptr. 493, 499 (1971) (condition may prohibit certain activities that ordinarily receive first amendment protection).

102. *See* Brief for Appellant, *Goldschmitt, supra* note 90, at 3. *See also supra* note 91 and accompanying text.

103. Transcript of Proceedings, *Goldschmitt, supra* note 7, at 6.

104. *Id.*

105. Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986), *appeal denied*,

edly seeking certiorari on the issue with the Supreme Court of the United States.[106]

Similarly, in May 1987, a trial judge in Portland, Oregon, suspended Richard J. Bateman's prison sentence in return for his promise to comply with another novel punishment.[107] Oregon State District Judge Dorothy M. Baker imposed on the twice-convicted child molester a sentence that allowed him to live in the community, but required him to post a sign on the front door of his residence and on both sides of his vehicle.[108] This sign read: "DANGEROUS SEX OFFENDER, NO CHILDREN ALLOWED." These signs contain a judicially-mandated lettering of three inches.[109]

Although upon each conviction of separate child molestation charges Mr. Bateman had declared he would not repeat his offense,[110] Judge Baker experienced doubts and imposed additional conditions upon his release.[111] She ordered that Bateman not live within ten blocks of his previous residence.[112] She declared public places where children might be found, such as zoos, parks and playgrounds, off-limits to him.[113] Finally, in addition to payment of a fine and attendance at a sex offenders treatment program,[114] Judge Baker ordered Bateman to hang the controversial sign throughout his five-year term of probation.[115]

Commenting on her innovative sentence, Judge Baker suggested that she had no other choice but to impose this unique sentencing

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496 So. 2d 142 (Fla. 1986).

106. *60 Minutes: Titus v. Metcalfe* (ABC television broadcast, February 2, 1986).

107. Brief for Appellant at 6, State v. Bateman, No. A44854 (Oregon Ct. App. filed November 11, 1987) [hereinafter Brief for Appellant, *Bateman*].

108. *Id.*

109. *Id.*

110. *Id.* at 12.

> *Mr. Bateman*: "I'm going to go out and start my life over again, and I'm not going to have anything to do with anybody."
>
> *The Court*: "You're not going to do this to children anymore?"
>
> *Mr. Bateman*: "No, ma'am."
>
> *The Court*: "Isn't that the same promise you made last time?"

Id.

111. *Id.* at 7.

> *The Court*: "[molesting small children is a sex offender's] way of life. They seem to think it's their right to be able to engage in this behavior. Treatment is only successful during the period of time that they are on treatment. If they are gone from treatment for two weeks, they are back reoffending."

Id.

112. *Id.*

113. *Id.* at 8.

114. *Id.* at 7.

115. *Id.* at 6-7. Further conditions of probation included submission to polygraphs and breath, urine and anal analysis. He was not to consume non-prescription drugs or alcohol and was to maintain full-time employment. *Id.* at 7.

arrangement.[116] Faced with the limited space in Oregon's prisons, she predicted that the defendant would be released within weeks of his conviction if he were incarcerated.[117] After such an early release from prison, officials would have no way of monitoring Bateman's activities, and Bateman, an alcoholic with a history of sexual offenses and anti-social behavior, was not a good risk to impose upon society after such a short time, with no limit on his activities.[118]

Although the prosecuting attorney enthusiastically supported the Judge's order,[119] others were displeased by this sentence.[120] The defendant is currently appealing this case to the Oregon Court of Appeals on the basis that the sentence is unconstitutional in several aspects.[121] Primarily, Bateman argues that this sentence violates his eighth amendment right to be free from cruel and unusual treatment.[122]

II. The Eighth Amendment Prohibition Against Cruel and Unusual Punishment

The prohibition against cruel and unusual punishment first appeared in early English documents.[123] The Magna Carta[124] contained a provision that permitted punishment only "in proportion to the measure of the offense."[125] This declaration was later codified in the English Bill of Rights of 1689, which stated: "Excessive bail might not be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[126] Nonetheless, harsh penalties continued in that country.[127]

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116. *Id.*
117. *Id.* at 12.
118. *Id.*
119. Silverman, *supra* note 15, at 8.
120. *Id.* Harvard Law School professor Arthur R. Miller has argued that the signs are nothing more than "a quick and dirty method that exemplifies a breakdown in the criminal justice system." *Id. See also* Brief filed Amicus Curiae, State v. Bateman, No. A44854 (Oreg. Ct. App. filed November 11, 1987) (filed by National Civil Liberties Union).
121. Telephone interview with Mr. Richard E. Fowlks, Counsel for Bateman at the trial court level (Sept. 14, 1988).
122. Brief for Appellant, *Bateman, supra* note 107, at 6. Bateman also contended that his right to privacy had been violated as well as his right to free speech. *Id.*
123. L. BERKSON, *supra* note 7, at 3.
124. THE MAGNA CARTA (1215).
125. L. BERKSON, *supra* note 7, at 3.
126. B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 40-46 (1971); Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 852 (1969). *See also* Ingraham v. Wright, 430 U.S. 651 (1977).
127. L. BERKSON, *supra* note 7, at 3-4. As late as 1792, the English Parliament invested judges with the power to order the dissecting and gibbeting of a murderer. *Id.* at 3. Gibbeting was the act of hanging a criminal in public view from a T-shaped structure. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 555 (1980). Gibbeting and hanging in chains,

Corporal punishment in the American colonies was milder and varied from the methods utilized in England.[128] There were few reported cases of men being broken on the wheel and little documentation of any significant number of persons being dissected, boiled, gibbeted or pressed to death. American colonists instead preferred to impose sanctions of humiliation or public indignation as a method of punishment.[129] Thus, devices such as the pillory, stocks, scarlet letter, ducking stool, whipping post and public penance were common in colonial America. Such punishments were community spectacles and always well-attended.[130]

A new mark in the development of rights against cruel and unusual punishment in America, began with the drafting of the federal Bill of Rights[131] in 1789,[132] which included a provision stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[133] This cruel and unusual punishment clause was a replica of that contained in the English Bill of Rights,[134] except that the "might not" contained in the English Bill of Rights was replaced with "shall not."[135] This variation has left doubt in the minds of judges as to what standards are to apply in determining whether punishment is cruel and unusual.[136] There are few standard guidelines and "the Supreme Court has consistently held that the concept of cruel and unusual punishment is constantly changing."[137] In *Weems v. United States*,[138] for example,

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as well as burning women at the stake, is reported to have continued well into the 1790s. *Id.* at 4. *See also* L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 209-13 (1948). By 1965, nearly all brutal methods of punishment were abolished by the English Parliament.

128. L. BERKSON, *supra* note 7, at 5.

129. *Id.* at 4-5; see also A. EARLE, *supra* note 1, at 1-118.

130. L. BERKSON, *supra* note 7, at 5.

131. *Id.* James Madison, the drafter of the Federal Bill of Rights, used the Virginia Declaration of Rights as a model for the cruel and unusual punishment section of the Bill. The Virginia Declaration of Rights was based on the English Bill of Rights. *Id.*

132. *Id.* at 7.

133. *Id.*

134. *Id.*

135. *Id.*

136. As Chief Justice Burger stated in Furman v. Georgia, 408 U.S. 238, 377 (1972) (Burger, J., dissenting), "From every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor." Justice Marshall pointed out in his concurring opinion that the concept of cruel and unusual punishment was intended to be read quite broadly, and the founding fathers meant to prohibit not only torture but other inhumane punishments. *Id.* at 319 (Marshall, J., concurring).

137. L. BERKSON, *supra* note 7, at 15. See Weems v. United States, 217 U.S. 349 (1910), in which the defendant was sentenced to 15 years in prison along with accessory penalties for false entries in a public document. The court found that the punishment inflicted an excessive penalty for such a minor crime. The court held that the "cruel and unusual" clause of the Constitution was not "fastened to the obsolete but may require meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. *See generally* Note, *The Effect of*

Justice McKenna stated: "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth."[139] He advanced this theory by further noting that the cruel and unusual clause "may acquire meaning as public opinion becomes enlightened by a humane justice."[140]

Lower courts, however, demanded an applicable, objective standard, and thus developed several tests. A few state courts maintained a simple, flexible standard. They considered punishment cruel and unusual if it "shocked the conscience of reasonable men."[141] There were problems of ambiguity and subjectivity with this approach, therefore the Supreme Court espoused a more workable test in *Furman v. Georgia*.[142]

In *Furman*, three separate defendants received the death penalty; one for the crime of murder and two for crimes of rape. The majority held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments."[143] In the concurring opinion, Justice Brennan stated:

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the clause that the state may not inflict inhumane and uncivilized punishments upon those convicted of crimes.[144]

Justice Brennan thus divided his theory into four primary questions, which will be grouped in pairs for the purposes of this Comment. They are as follows: 1) Is the punishment unacceptable to contemporary society or so degrading to human dignity as to cause the

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Rhodes v. Chapman on the Prohibition Against Cruel and Unusual Punishment, 35 ARK. L. REV. 731 (1982).

138. 217 U.S. 349 (1910).

139. *Id.* at 373, *cited in*, L. BERKSEN, *supra* note 7, at 15.

140. *Id.* at 378, *cited in* L. BERKSEN, *supra* note 7, at 15. This philosophy was still followed by the Court forty-eight years later. *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (eighth amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society.").

141. *See, e.g.*, State v. Teague, 215 Or. 609, 611, 336 P.2d 338, 340 (1959). *See also* L. BERKSEN, *supra* note 7, at 15.

142. 408 U.S. 238 (1972), *cited in*, L. BERKSEN, *supra* note 7, at 15.

143. *Id.* at 239-40.

144. *Id.* at 282.

offender mental anguish? 2) Is the punishment arbitrarily inflicted or excessive in relation to the offense committed?[145]

Judges may give varying weight and credence to the criteria set out by Justice Brennan. If we apply these standards to the punishments utilized today, some sentences may undoubtedly be constitutionally suspect. Under these guidelines, warning signs such as those used in *Bateman* and *Goldschmitt*, however, do not violate the eighth amendment.[146]

A. Is the Punishment Unacceptable to Contemporary Society or So Degrading to Human Dignity as to Cause Mental Anguish?

Scarlet letter-type sentences are not unacceptable to contemporary society or so degrading to human dignity as to cause mental anguish. These warning signs imposed upon offenders are not the same as being forcibly marched to the scaffold and shackled to the public pillory.[147] The differences between the degrading physical rigors of the pillory and a sign, which in some cases is voluntarily elected[148] by the offender in return for certain privileges, are unmistakable. Unlike the scarlet A worn by Hester Prynne[149] or the letters worn by those guilty of crimes in the 1600s to 1700s,[150] these signs serve a useful and practical purpose. Public drunkenness and adultery, common crimes in the colonial America that received scarlet letters as punishment,[151] are not crimes that threaten the public well-being. The letters, therefore, were placed upon those people for the sole purpose of humiliating the offender. Such a practice would be offensive to contemporary society and therefore cruel and unusual punishment under the Brennan standard announced in *Trop*.[152]

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145. *Id.* at 257-305, *developed in*, L. BERKSEN, *supra* note 7, at 15.

146. These sentences have been attacked on first amendment, fifth amendment and eighth amendment bases. This Comment is concerned solely with the eighth amendment issue.

147. *See generally* Hobbs v. State, 133 Ind. 404, 32 N.E. 1019 (1893); State v. Moilan, 140 Minn. 112, 167 N.W. 345 (1918). *See also* Brief for Appellee, *Bateman, supra* note 107, at 29.

148. Bateman's condition of probation was not elected on a voluntary basis. The judge imposed the sign as a mandatory term of his probation. The imposition of probation as a whole, however, was not mandatory and could have been refused. If refused, however, Mr. Bateman would have then faced incarceration. Brief for Appellee, *Bateman, supra* note 107, at 13 ("If you wish to give up probation that's your choice but that is a term of your probation."). Goldschmitt had the choice of affixing the sign to his car and thereby receiving restricted driving privileges, or not placing the sign on his car and receiving six months license suspension. Transcript of Proceedings, *Goldschmitt, supra* note 103, at 6.

149. N. HAWTHORNE, THE SCARLET LETTER (1850).

150. *See generally*, A. EARLE, *supra* note 1, at 88 (1986).

151. *Id.*

152. 356 U.S. 86 (1985). In *Trop*, the Court declared unconstitutional a statute that authorized denationalization as a punishment for desertion from the United States military

The scarlet letters used today are very different than those used in the past. Their primary purpose is not to humiliate or draw public ridicule but rather to protect potential victims by warning them of the danger these offenders pose. Undoubtedly, an unfavorable stigma attaches to those who bear such a warning. These signs, however, are the least restrictive alternative to incarceration.

When the court in *Trop* spoke of punishments inconsistent with the "evolving standards of decency that mark the progress of maturing society,"[153] it referred to the imposition of extreme punishments, such as unnecessary and wanton infliction of pain or emotional distress, unusually extensive incarceration, and involuntary expatriation.[154] Courts have found that punishments as extreme as death survive eighth amendment analysis when the offense is severe enough to warrant this punishment.[155] Thus, one who challenges scarlet letter sentences under the same theory trivializes the cruel and unusual clause, by suggesting that it precludes a judge from imposing a warning sign upon a dangerous criminal in the interest of protecting society but allows, nevertheless, for the death penalty.[156]

As the Eighth Circuit Court of Appeals found in *United States v. William Andersen Co.*,[157] "the deterrent, and thus the rehabilitative effect of punishment results if it 'inflicts disgrace and contumely in a dramatic and spectacular manner.' "[158] The Court further reasoned that "measures are effective which have the impact of the 'scarlet letter' described by Nathanial Hawthorne or the English equivalent of 'wearing papers' in the vicinity of Westminster Hall like a sandwich-man's sign describing the culprit's transgressions."[159]

Although innovative sentences could be carried to extremes that would offend constitutional standards,[160] providing a dangerous of-

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forces. The punishment of denationalization was "cruel and unusual" because it was outside traditional penalties. *Id.* at 101.

153. *Id.* at 101.

154. *Id*; *see also* Brief for Appellee *Bateman, supra* note 107, at 34.

155. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). It is well settled, through these cases, that the death penalty is not invariably cruel and unusual punishment within the meaning of the eighth amendment.

156. *See* Brief for Appellee, *Bateman, supra* note 107, at 34.

157. 698 F.2d 911 (8th Cir. 19__) (affirming sentences for corporate defendants found guilty of antitrust provisions to brief periods of incarceration, community service, and fines).

158. *Id.* at 913.

159. *Id.*

160. *See, e.g.*, Bienz v. State, 343 So. 2d 913 (Fla. Dist. Ct. App. 1977) (probationary halfway house supervisor ordered the defendant to wear diapers over his regular clothing as punishment for immature behavior).

fender with the alternative of wearing a warning sign as opposed to complying with a statutorily imposed sentence does not create such an extreme. For example, in *Bateman* and *Goldschmitt*, the sentencing judge did not demand that the sign become any part of the offender's clothing or person.[161] Rather, the sentence imposed in each case was the least restrictive alternative to incarceration and was less severe in its restrictions of liberty than that allowable under the law. Thus, because these sentences do provide a public service and are not purely degrading in nature, they are acceptable to contemporary society.[162] That public acceptance may be further encouraged by the recognition of the need to develop alternatives to incarceration that will protect society while being economically feasible.[163] Furthermore, these sentences offer legitimate answers to this pressing dilemma and are not simply an embarrassment to the offender. They are thus not so degrading that they cause mental anguish.

B. Is the Punishment Arbitrary or Excessive In Relation to the Offense Committed?

Unique sentences are not necessarily arbitrary. As the court noted in *People v. McDowell*,[164] "merely because a [probation] condition is out of the ordinary does not make it constitutionally unreasonable."[165] As long as the punishment is potentially available to all similar offenders, it is not an arbitrary punishment.[166] Judges need not give all similar offenses the same sanction. A judge should instead consider the offender's past record and the offense committed, as well as any mitigating and aggravating circumstances, and fashion a sentence appropriate for the individual offender. Thus, arbitrariness is assessed on a case-by-case basis.

Florida's bumper sticker program is not arbitrary because the option to participate in the program is extended to all first-time DUI offenders appearing before Judge Titus and Judge De Furia.[167] The docket of the Sarasota County Court in Florida is administered by

161. Transcript of Proceedings, *Goldschmitt, supra* note 90, at 6 ("[The bumper sticker] will not be made part of your person. It will not be displayed on your face, your body or any other party of you. It will be placed on your car only if you wish to drive for business purposes only.").

162. *Id.*

163. KRAMER, *supra* note 10, at 320.

164. 59 Cal. App. 3d 807, 130 Cal. Rptr. 839 (1976).

165. *Id.* at 812, 130 Cal. Rptr. at 843.

166. *Id.*

167. *60 Minutes: Metcalfe v. Titus* (CBS television broadcast, February 2, 1986).

alphabet.[168] The first letter of an accused's last name determines before which judge he or she will appear.[169] Each judge has the authority to apply sentencing conditions, which include participation in the bumper sticker program, as long as the conditions conform with applicable statutes.[170]

Judge Baker of the Oregon District Court, in imposing the sign sentences, also acted within her realm of discretion. The conditions she imposed upon Richard Bateman, the convicted child molester, were not arbitrary. In the interest of society, she opted to suspend his prison sentence and place him on special terms of probation.[171] Oregon law gives judges broad discretion to allow for individualized sentences that are both appropriate for the individual and in the best interest of society.[172] The fact that not all child molesters convicted in Oregon will receive the punishment given to Bateman does not render his sentence arbitrary. Judge Baker, however, did imply that she planned to use a similar sentence with all child molesters.[173]

In *Coker v. Georgia*,[174] the Supreme Court clarified the concept of excessive punishment. An unconstitutionally excessive punishment exists when the punishment is grossly disproportionate to the severity of the offense or when the punishment does not contribute to the acceptable goals of punishment.[175] In *Coker*, the Supreme Court found that a Georgia statute that provided that a person convicted of rape could be sentenced to death constituted excessive punishment.[176] While recognizing that rape is a serious crime, the Court declared that "the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such and as opposed to the murder, does not unjustifiably take human life."[177]

Like the death penalty, a scarlet letter sentence can be considered excessive only after one considers the gravity of the offense

168. *Id.* at 12.

169. *Id.* Judge Titus presides over all people whose last name begins with the letter "G" through "N". Judge De Furia receives those cases with the letter "A" through "F." The remaining last names beginning with "O" through "Z" are handled by the county court's third judge, who does not utilize the bumper sticker program. *Id.*

170. *Id.*

171. Sentencing conditions in Oregon need only be reasonably related to the offense or to the needs of an effective probation. *E.g.*, State v. Martin, 282 Or. 583, 580 P.2d 536 (1978).

172. OR. REV. STAT. § 137.010(1) (1971) placed an obligation upon a sentencing court "to pass sentence in accordance with this section unless otherwise specifically provided by law." *Id.*

173. Brief for Appellee, *Bateman, supra* note 107, at 7-8.

174. 433 U.S. 584 (1977).

175. *Id.* at 592.

176. *Id.* at 585.

177. *Id.*

committed. Thus, the first *Coker* criterion — gravity of the offense — must be evaluated on a case-by-case basis.

The second *Coker* criterion declares a punishment excessive if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[178] *Coker* further explains that these eighth amendment considerations should be based upon objective factors.[179] Important in this analysis is what society considers to be acceptable goals of punishment.[180] The scarlet letter sentences of the past were purely humiliating in effect. While they may have created a specific deterrent for the offender, they more probably served only to instill in the offender contempt and disrespect for the judicial system. Thus, scarlet letter sentences of the past did not contribute to an acceptable goal of punishment and would violate the cruel and unusual clause. Scarlet letter sentences of today, however, do further the goals of punishment and thus satisfy the *Coker* standard for constitutionally acceptable punishments.

1. Acceptable Goals of Punishment.—The purpose of criminal laws is to encourage members of society to act in a socially acceptable manner and to prevent conduct that is undesirable.[181] Because the criminal justice system punishes offensive behavior rather than encouraging proper behavior, its emphasis is on crime prevention.[182] The threat of punishment furthers prevention.[183] There are a number of acceptable goals of punishment. The acceptable goals of punishment have been recognized to include the following: specific deterrence, general deterrence, rehabilitation, education, incapacitation and retribution.[184] If scarlet letter sentences further no acceptable goal, the imposition of such sentences is unconstitutionally excessive under the *Coker* standard.[185]

(a). Specific Deterrence.—Specific deterrence is the deliberate threat of punishment with the purpose of discouraging antiso-

178. *Id.* at 592.
179. *Id.*
180. *Id.*
181. W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5. *See also* G. SCHEDLER, BEHAVIOR MODIFICATION AND "PUNISHMENT" OF THE INNOCENT: TOWARDS A JUSTIFICATION OF THE INSTITUTE OF LEGAL PUNISHMENT (1978).
182. W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5.
183. *Id.*
184. *Id. See also* United States v. Carlson, 562 F. Supp. 181, 183-84 (N.D. Cal. 1983).
185. Coker v. Georgia, 433 U.S. 584, 592 (1977).

cial or unacceptable conduct.[186] This theory of punishment aims at deterring a particular offender from repeating his criminal conduct or from committing any further crimes.[187] This goal is accomplished by providing the offender with a punishment that he would not choose to endure a second time.[188] Common sense dictates that the more severe a penalty, the more likely that the offender will refrain from that conduct. Thus, whenever society is alarmed about a certain crime or rate of recidivism, there is a great demand to increase the severity of the punishment.[189] This is evident in the current societal demand for harsher penalties for drug traffickers and drunk drivers.[190]

Penologists, however, have found that the severity of the punishment is not necessarily what influences offenders to refrain from committing further crimes. Rather, it is the certainty or objective probability of being convicted.[191] In this regard, the scarlet letter sentence may prove to be very effective. As a result of his publicly posted sign, the Oregon sex offender may rightfully believe that local police are aware of his past offense and will be closely monitoring his conduct. The scarlet letter-type sentence, unlike incarceration or probation, does not let the offender conceal his criminal history. His offense is publicized clearly and, therefore, the probability of this offender committing a similar undetected offense in the same community is quite small. Therefore, the objective probability of his being arrested and convicted, should that offender return to a criminal lifestyle, is quite high. The scarlet letter penalty thus is a persuasive deterrent against committing another crime.

(b). General Deterrence.—General deterrence is quite

186. N. WALKER, PUNISHMENT, DANGER, STIMGA, THE MORALITY OF CRIMINAL JUSTICE 65 (1980). *Compare* footnotes 186-216 *with* Note, *The Bumper Sticker: The Innovation that Failed*, 22 NEW. ENG. L. REV. 643, 661-70 (1988) The author of the note directly opposes the view espoused in this Comment.

187. W. LAFAVE & A. SCOTT, *supra* not 12, at § 1.5.

188. *Id.* Critics contend that the theory of punishment is ineffective, as evidenced by the high rate of recidivism among those that have been punished. Others refute these doubts by stating that the rate of recidivism would be greater if there were no punishments aimed at specific deterrence. *Compare* L. HALL & S. GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 17 (1958) *with* Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 181 (1952).

189. N. WALKER, *supra* note 60, at 71. *See generally War on Alcohol Abuse Spreads to New Fronts*, U.S. NEWS & WORLD REP., Dec. 24, 1984, at 63. In response to the nation's amount of alcohol-related accidents almost every state has adopted stiffer penalties in their drunken driving statutes.

190. *War on Alcohol Abuse Spreads to New Fronts, supra* note 189, Dec. 24, 1984, at 63.

191. N. WALKER, *supra* note 193, at 71.

similar to specific deterrence in that it is a deliberate threat of punishment aimed at discouraging criminal conduct.[192] Under this theory, however, the punishment of a criminal offender is designed to deter not only the individual but also potential offenders in the community.[193] Thus, general deterrence is concerned more with deterring society in general than with deterring the individual offender.[194] According to this theory, society must punish offenders in order to set an example that deters others from acting in a similar manner.

Scarlet letter sentences provide such a deterrent to society, because those that see signs attached to convicted persons become aware that these crimes are being punished and that there is a stigma attached to criminal behavior. Such sentences encourage potential offenders who see the signs to contemplate their fate before acting and to reject a criminal career in order to escape punishment and humiliation. Indeed, witnessing or hearing about such warning signs may have a sobering effect when persons in the community consider the ramifications of having such a stigma attached to themselves. Such signs may make work, home and friends more difficult to obtain. "The deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner."[195] If one is aware that simply paying a fine or serving some discrete time in a prison will not necessarily be the punishment for criminal behavior, people may be forced to consider such ramifications of anti-social behavior. To avoid such consequences, the public must actively choose a law-abiding lifestyle. It is much more difficult for the public to dismiss the consequences of criminal behavior if an offender is publicly paying his penance within the community rather than if that person was sent away to prison. The sentence not only serves to remind the community of the severity of the offense on the day of sentencing but also serves as a reminder each day that sentence is served.

(c). Rehabilitation.—The theory of rehabilitation focuses on providing the offender with appropriate treatment in order to modify his anti-social behavior into acceptable conduct.[196] It emphasizes the changing of conduct of the individual offender.[197] In actual-

192. *Id. See also* W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5.
193. W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5.
194. *Id.*
195. United States v. Williams Anderson Co., 698 F.2d 911, 913 (8th Cir. 1983).
196. W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5(a)(3).
197. *Id.*

ity, it is not entirely correct to refer to rehabilitation as "punishment." The emphasis on rehabilitation is not upon causing the malefactor to suffer for his crime but rather upon improving the offender's behavior.[198] Successful rehabilitation of a defendant requires that sentences be tailored to fit the offender rather than the offense.[199] "Punishment, therefore, is justified under this theory only so far as the sentence will reform the individual into a productive member of society."[200]

Warning signs act as a "Pavlovian" behavior modification technique.[201] Each time the offender encounters the sign, he is cognizant of his activity and the illegality of that behavior.[202] The sign reinforces upon the offender that this behavior is unacceptable and will result in punitive treatment and stigma. The offender is also aware of society's determination to see this behavior condemned. Thus, should the defendant contemplate reviving a criminal lifestyle, the sign reminds the probationer of the humiliation and social degradation associated with the criminal behavior. It repels the offender from committing unacceptable conduct and causes instead lawful behavior.

(d). Education.—Under the theory of education, criminal punishment serves to educate the public as to what behavior is acceptable and what is intolerable.[203] Trial and conviction, as well as the actual punishment, publicize the distinctions between tolerable and intolerable behavior.[204] While some crimes, such as murder and rape, are generally known to the public as serious offenses,[205] crimes such as drunken driving and prostitution, as well as other sexual of-

198. *Id.*

199. N. WALKER, *supra* note 185, at 62; *see also* R. GERBER, CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, JUSTIFICATIONS 175-77 (1972).

200. N. WALKER, *supra* note 185, at 62.

201. Goldschmitt v. State, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986), *citing* Brief for Appellee, *Goldschmitt, supra* note 90, at 6. *See also* United States v. Carston, 562 F. Supp. 181 (N.D. Cal. 1985). In *Carston*, the defendant was convicted of tax evasion and sentenced to teach the use of computers to probationers and parolees. The court noted that by association with street criminals, the defendant would be "constantly reminded that his conduct was legally and socially wrong." *Id.* at 185.

202. Transcript of Proceedings, *Goldschmitt, supra* note 90, at 7.

> *The Court*: It may make you angry. It may subject you to some humiliation, but while you have to display it, hopefully you will be learning and taking to heart everything you learned in the DUI Counteraction School that you're not supposed to drink to excess and drive a vehicle.

Id.

203. W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5(a)(5).

204. *Id.*

205. *Id.*

fenses, may not always be understood or even opposed by the general public. The public often underestimates the gravity of these crimes, as is evidenced by the high rate of offense in these areas.[206] Scarlet letter sentencing is particularly effective in alerting the public to the seriousness of these offenses.

Warning signs may educate the public about the criminality of certain behavior, as well as the consequences entailed should the offensive behavior be detected. Many Americans are unaware of the penalties that certain offenses carry and therefore may disregard the possibility of arrest should their criminal behavior continue. Scarlet letter sentencing, however, forces the public to recognize that criminal laws are being enforced and encourages private citizens to police their own activity.

The signs, therefore, are a form of community service. They serve as a reminder that illegal activities will be condemned and publicly prosecuted. This, in turn, instills faith in our criminal justice system.

(e). Incapacitation.—Under the theory of incapacitation, the offender is restrained in the interest of protecting society from those "persons deemed dangerous because of their past criminal conduct."[207] Institutionalizing an offender is the obvious milieu for restraint, but as penal institutions become overcrowded and costly, society must develop efficient alternatives.[208] Incapacitation does not always necessitate the use of prisons. It involves only the act of restraint, be it physical, legal or moral.

In the cases offered earlier as illustration, the judges ordered the use of warning signs as a term of probation. These terms, however, were not the only conditions imposed. Each judge designed an individualized program with several mandatory conditions to provide for the restraint of the individual.[209]

Bateman, the convicted child molester, was not permitted to enter any parks, zoos or areas that children may frequent.[210] Furthermore, he was not allowed within a ten-block radius of his previous address, nor to associate or communicate in any way with a child below the age of eighteen.[211] This type of sentencing program pro-

206. *Id.*
207. *Id.* at § 1.5(a)(2).
208. *Id.*
209. *See* Brief for Appellant, *Bateman, supra* note 107, at 6-7; Transcript of Proceedings, *Goldschmitt, supra*, note 90, at 4.
210. Brief for Appellant, *Bateman, supra* note 107, at 6.
211. *Id.*

vides for the restraint of the offender without a large economic burden on the American public, while also providing for the safety of the community. Although such a program may not be appropriate for a high risk offender,[212] scarlet letter programs such as illustrated here provide an effective alternative for low-to-middle-risk[213] offenders.

(f). Retribution.—The goal of retribution is premised upon the theory that "the primary justification of punishment is always to be found in the fact that an offense has been committed which deserves punishment, not in any future advantage to be gained by its infliction."[214] The gravity of the offense committed determines the degree of suffering that ought to be imposed on the offender.[215] The oft-quoted biblical phrase "an eye for an eye, a tooth for a tooth" best exemplifies the reasoning behind the goal of retribution.[216]

While the offenders in the *Goldschmitt* and *Bateman* cases had the choice of completing jail time or abiding by the challenged probation conditions, either alternative provides a form of retribution. Neither path enables the defendants to escape punishment. The scarlet letter sentence is, in effect, a degrading experience. Society is privy to the suffering of the offender. For an offender such as Bateman, who sexually abused and traumatized young children, this sentence is particularly appropriate. It allows the sex offender to feel disgrace and humiliation similar to that felt by a sexual abuse victim. In effect, he too becomes stigmatized in the community. Particularly in this example, the scarlet letter sentence truly represents "an eye for an eye, a tooth for a tooth."

IV. The Right of Society to be Protected

Society has a right to be protected from an imminent harm or danger.[217] That right justifies identifying and controlling those persons who pose a threat to society.[218] This social defense justification requires that penologists predict which persons pose a threat to soci-

212. High risk offenders are those criminals, such as murderers and violent rapists, who pose a serious threat to the public's well-being.

213. Low-to-middle-risk offenders include all persons who commit non-violent crimes. "Low risk" designates criminals such as drunk drivers, thieves and white-collar criminals.

214. W. LAFAVE & A. SCOTT, *supra* note 12, at § 1.5(a)(6).

215. *Id.*

216. *See* R. GERBER, *supra* note 13, at 39.

217. *See id.* at 129.

218. *See id.*

ety and the degree of that threat.[219]

Incarceration is often accepted as the best means for insuring that society's right to be protected is not violated. Alternative sentences have partially grown out of courts' recognition that prison overcrowding and resulting early releases undermine the ability of a prison sentence to insure that protection.[220] Such judges feel they have no choice but to design alternatives to traditional prison sentences.[221] For example, in the *Bateman* case, the sentencing judge estimated that the defendant, had he been sentenced to prison, would have been paroled within a few weeks for a felony that could have brought him a ten year term under the statutory sentencing scheme in Oregon.[222]

The American Civil Liberties Union has argued that alternative punishments are a needless and ineffective imposition of suffering, in that the class of persons at which these sanctions are aimed may be unable to read these signs.[223]

Thus, the organization argues that such sentences do not further society's right to protection. Such a conclusion, however, is too narrowly drawn. While there may be incidents when a child is both unsupervised and unable to read or the offender is not in his house or by his car where the signs are posted. Many potential child victims will be able to read the signs or will be with an adult who will recognize the danger. In the alternative, the offender may be unsure as to whether the child is illiterate, and that doubt will therefore discourage him from engaging in the offensive behavior.

In any event, such signs will make it more difficult for sexual molesters to repeat their criminal behavior and penologists contend that the prevention of just one case of molestation justifies this method of punishment.[224] In fact, of the three separate offenses that were committed by the *Bateman* defendant, two could have been prevented by these signs. In those instances, an adult or child capable of reading left the victim in the sole custody of the defendant. In all three cases, the defendant molested the children in his home. Had the signs been posted on Bateman's home at the time of the offenses, in all likelihood the children would not have been left with Bateman

219. *Id.* at 129-30.

220. Silverman, *supra* note 15, at 8.

221. *Id.*

222. *Id.*

223. *See* Amicus Curiae Brief of American Civil Liberties Union at 5, State v. Bateman, No. A 44854 (Or. Ct. App. 1986).

224. Silverman, *supra* note 15, at 8.

and the molestations would have not occurred.

Alternative sentences also protect society when the defendant is a drunk driver. Statistics reveal that almost fifty percent of all deaths occurring on our roadways are alcohol-related.[225] Every twenty minutes marks the occurrence of an alcohol-related death.[226] Legislatures and courts have been unsuccessful in their attempt to significantly curtail these accidents by simply mandating stiffer penalties.[227]

In *Goldschmitt*, the two judges implemented their bumper sticker program in an attempt to protect society from this prevalent danger. Since then, the Ohio legislature also has opted for a similar program.[228] These devices alert other drivers to drive defensively and warn potential passengers that it may not be safe to accept rides from these marked drivers.

These programs have been criticized as allowing convicted drunk drivers to regain their drivers' license after they have been found to be a danger to the public.[229] Although a period of license suspension may be effective in keeping a drunken driver off the road, license suspension may cause socio-economic problems which could far outweigh or exacerbate the possibility of alcohol abuse by a one-time offender. Without a driver's license, it may be difficult for the offender to maintain a job or attend the alcohol treatment or community service programs that the court may have mandated as a part of sentencing disposition. By allowing the offender to maintain his license for business purposes, he is less likely to violate his probation conditions or experience financial disaster.

V. Legislative Action

While scarlet letter sentencings provide less restrictive alternatives to incarceration while still protecting society, legislatures on the state and federal level must provide detailed guidelines as to what

225. B. LANDSTREET, THE DRINKING DRIVER: THE ALCOHOL SAFETY ACTION PROGRAMS 3 (1977).

226. *Id.*

227. *See War on Alcohol Abuse Spreads to New Fronts*, U.S. NEWS & WORLD REP., Dec. 24, 1984, at 63. *See also* Note, *supra* note 186, at 643 (1988). "In response to the nation's drunken driving problem, almost every state has adopted new drunk driving statutes which mandate stiffer penalties for offenders." *Id.* Many of the new state drunk driving laws require prison sentences or community service work and heavier fines. *Id.* For example, the Rhode Island drunk driving statute requires an offender convicted of drunk driving to fulfill either ten to sixty hours of community service or a jail sentence of up to one year. R.I. GEN. LAWS § 31-27-2 (Supp. 1987).

228. OHIO REV. CODE ANN. § 4503.231 (Baldwin 1984) *supra* note 4.

229. *See* Note, *supra* note 186, at 643.

alternatives may be implemented and who may be a candidate for these programs. Certainly, legislatures alone cannot guarantee that these sentences will survive constitutional attack, but their debates and input will help to overcome problems of inequity. County to county, the same crime thus will have the same list of alternatives to incarceration, from which the sentencing judge may still employ his discretion in choosing from the list. Such legislation effectively provides for the equities and economic considerations of determinate sentencing structures and also allows for the individualized sentencing provided in indeterminate sentencing structures.

Many states still declare that "any term of probation is acceptable if it is reasonably related to a rehabilitative purpose."[230] Such a standard may have been sufficient when incarceration was the primary form of punishment. As a result of an increased reliance upon probation and the influx of more hardened criminals into the probation system in response to prison overcrowding, a more defined structure is now necessary.

The American Bar Association has prepared recommendations to legislators pertaining to criteria that should be developed into sentencing guidelines for judges.[231] The A.B.A. has recognized that "the subject of sentencing has in so many ways, been treated in a manner which is not commensurate with its importance."[232] In its report, the Committee de-emphasized confinement and stressed innovative forms of sentencing which would provide the least restrictive alternatives to incarceration.[233]

The Committee made two specific recommendations for those legislatures dealing with alternatives for the sentencing court. First, courts responsible for sentencing "should be provided in all cases with a wide range of alternatives, with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case."[234] Therefore, legislatures should develop a system such as that which follows:[235]

230. *See, e.g.*, State v. Asher, 40 Or. App. 455, 595 P.2d 839 (1979).

231. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 337 (1974). *See also* Johnson, *Frustration: The Mold of Judicial Philosophy*, CRIMINAL JUSTICE 84/85, 214, 214-18.

232. *Id.* at 339. *See also* Johnson, *supra* note 231, at 216.

233. *Id.* at 343. *See also* Johnson, *supra* note 231, at 216.

234. *Id.* at 351.

235. *See* O'Leary, *Reshaping Community Corrections*, 31 CRIME AND DELIQUENCY 357 (1985).

Degree of Risk	Acceptable Programs
High Risk	Maximum Security Prison Medium Security Prison Minimum Security Prison
Middle Risk	Local Correctional Facility Halfway House Home Detention
Middle-Low Risk	Scarlet Letter sentence coupled with a low-risk sentence Intensive Supervision Probation
Low Risk	Community Service/Restitution Earn-it Programs

As suggested by the above diagram, scarlet letter sentencing should be statutorily provided as an alternative sentence for middle-low risk offenders. Further, judges should be provided the discretion to combine these alternatives when appropriate, so that a scarlet letter sentence may be coupled with a term of probation, parole or community service, or whatever the judge deems suited to the individual needs and risk of the defendant.

In addition, the A.B.A. also recommends that legislative bodies "should authorize the sentencing court in every case to impose a sentence of probation or a similar sentence not involving confinement."[236] Thus, the organization suggests a broadening of judicial discretion in the imposition of sentencing, which permits individual tailoring in sentencing.

It is important to note that not all offenders are appropriate candidates for scarlet letter sentences. A wife subjected to spousal abuse, who kills her husband in an act of passion or self-defense, is not an appropriate candidate for the scarlet letter sentence. There is little reason to warn society of her once-violent behavior, because her violence was focused upon one person, and she does not pose a threat to society at large. On the other hand, a dangerous sex offender or rapist poses a serious threat to society. These offenders have the highest rate of recidivism because they are often not rehabilitated after their first offense.[237] They are therefore less likely to restrain

236. *Id.* at 352. *See also* Johnson, *supra* note 231, at 216.

237. Brief for Appellee, *Bateman, supra* note 107, at Appendix C-7, *citing* Freeman-Long & Wall, *Changing a Lifetime of Sexual Crime*, PSYCHOLOGY TODAY, March 1986, at 64. ("Most untreated sex offenders go on to commit more offenses — Indeed, as many as 80 percent do.") *See also* Brief for Appellee, *Bateman, supra* note 107, at 7:

The Court: It's their way of life. They seem to think it's their right to be

their offensive behavior. If made aware of the existence of such criminals in the community, members of society may act defensively around such persons and prevent their own victimization.

VI. Conclusion

Scarlet letter-type sentences are one of the many intermediate punishment programs that show great promise. They are less restrictive alternatives to incarceration and may reduce prison populations without posing serious hazards to the safety of the general public. The alternative to such sentences is unsatisfactory. As a result of prison overcrowding, many first-time offenders, as well as repeat offenders, are released with nothing more than a promise not to commit another crime. Such treatment serves only to facilitate the offender's opportunity to commit more crimes.

A scarlet letter program does not allow the offender or society to forget the gravity of an offense quickly. It actually helps the offender to reform, or at the very least, keeps the criminal from repeating an offense by placing society, as well as the police, on the defense, and by ultimately making it more difficult for the defendant to reoffend. Under such a sentencing scheme, society does not vulnerably await further victimization but takes instead precautionary measures to ensure safety. Thus, the scarlet letter sentencing alternative is one such method that we may desire our legislatures to make available to the courts.

Rosalind K. Kelley

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able to engage in this behavior. Treatment is only successful during the period of time that they are on treatment. If they are gone from treatment for two weeks, they are back reoffending.

Id.